

## **Section 194 Legal Services Act 2007**

*Pro bono* came of age on October 1<sup>st</sup> 2008. That was the day when s.194 Legal Services Act 2007 came into effect, conferring legislative recognition of pro bono legal services and enabling a valuable new source of financial support for organisations (such as law centres) which provide free legal services and the pro bono charities that organise the provision of free legal services. This article is intended to provide practitioners with an introduction to the new system.

S.194 enables a court to make an order, equivalent to an order for inter party costs, against the opponent of a litigant who has been represented pro bono. However, unlike a normal costs order under which the beneficiary is the successful litigant, the beneficiary of a s.194 order is the Access to Justice Foundation.

### **The Access to Justice Foundation**

The Foundation is a charity the objects of which are to receive and distribute additional financial resources which will ultimately benefit those, like advice agencies, law centres and pro bono organisations, who help to provide pro bono legal advice or assistance to those who need it most. The Foundation distributes some of the funds it holds, whether from s.194 orders or other sources, through Regional Legal Support Trusts modelled on the successful example of the London Legal Support Trust. Other of the funds it holds are distributed directly to the national pro bono organisations, which deploy pro bono legal expertise both here and in the developing world. The aim of this structure is to provide a single national body to enable a strategic approach to the distribution of this extra support for legal assistance, coupled with regional bodies to identify specific local needs.

The Foundation is not an alternative to Community Legal Service funding, nor is it ever likely to have the resources, inclination or structure to make it so. It does not, for example, directly fund legal representation in individual cases at all. Rather it aims to provide financial support where most needed to organisations such as those described above, which assist those to whom LSC funding is not available.

### **The statutory scheme**

S.194 sets out the criteria for the making of an order, and provides for these to be supplemented by Rules of Court. S.194 orders may only be made by a 'civil court', which is defined as the Court of Appeal (civil division), the High Court and the county court. Such orders may be made in any proceedings in which a party had legal representation, all or part of which was provided free of charge. They may be made even if one of the party's legal representatives (say, counsel) was not acting free of charge. They may not, however, be made against a party who was himself wholly represented pro bono or under LSC funding.

In deciding whether to make an order the court must have regard to what costs order would have been made if the party applying for the order had not been represented pro bono (s.194(4)), and cannot make a s.194 order for more than the amount which would have been determined under a conventional costs order (CPR 44.3C(2)). Although the order must provide for payment to the Foundation (CPR 44.3C(3)), the mechanism for this is that the pro bono represented litigant is treated as the receiving party and is therefore the one to apply for the order and to quantify the

costs. S/he is bound to notify the Foundation by sending it a copy of the order within 7 days of receiving it.

S.194 contains an important transitional provision. No s.194 order may be made in respect of representation provided before 1<sup>st</sup> October, but the corollary must be that such an order may be made in cases on-going at 1<sup>st</sup> October in relation to work done after that date.

The Costs Practice Direction has been amended to take account of s.194 orders. Bills of costs under s.194 must not include VAT (para. 5.21). Para. 6.2, which concerns estimates of costs, has been adapted to extend them to pro bono cases. The assessment of s.194 costs may be either summary or detailed, as in the case of ordinary costs (CPR 44.3C(2)). Although the rules for when summary assessment should be used are no different in s.194 cases, it is anticipated that there will be a tendency to opt for summary assessment where possible.

### **How does this affect the parties to pro bono litigation?**

In one sense the new regime operates to level the playing field between the litigant represented pro bono and his conventionally represented opponent. The threat of costs will henceforth be a weapon in the armoury of the pro bono litigant (just as to date it has been in the armoury of his opponent), and the new exposure to adverse costs will cause the opponent to adopt a more cautious approach to his opposition. S.194 will undoubtedly bring more opponents to the negotiating table and be an important factor when negotiations are taking place.

In another sense, though, the playing field is not level. Pro bono litigants remain liable for any costs which are ordered in favour of the opponent, but their impecuniosity continues to make that risk more theoretical than real in many cases. S.194 does not contain an equivalent to the shield against inter partes costs orders that LSC funding carries by statute, but it does not need to do so: the shield is created by the impracticality of getting money out of most pro bono litigants. Pro bono advisers should not, though, adopt too casual approach to this: bankruptcy remains a remedy to the opponent of an impecunious litigant, and pro bono clients are as exposed to this as much as any other litigant with insufficient resources.

The creative opponent of an unsuccessful pro bono litigant who seeks to level the playing field by seeking an order for costs against the Foundation under s.51 Supreme Court Act 1981 will, however, be disappointed. The Foundation meets none of the criteria for the making of such an order. It will not usually even know of the existence of the litigation until an order under s.194 has been made: it will never be in a position to control or direct the litigation and it does not fund it in any way. It is simply the recipient of any 'costs' that are obtained from an opponent. If those who backed Neil Hamilton MP's unsuccessful libel action against Mr. Al Fayed were held to be "pure funders" and not susceptible to a s.51 order because of their lack of control of the litigation, charitable motives and lack of financial stake in it other than for the return of their funds, the Foundation, which is a registered charity, designated as recipient under a statutory regime and serving the public interest, and which has provided no funds and has no control and no greater financial stake in the outcome, must be equally free from risk – see *Hamilton v Al Fayed (No.2)* [2003] 1 QB 1175.

There is one practical issue which needs careful consideration. This concerns what happens in a case where there is a series of costs orders going either way. If the first order is made in favour of the

Foundation and the second made in favour of the opponent, it will not be possible to direct a set-off of these orders, as they lack the mutuality essential for ordering set-off: as a later court has no general power to revoke an earlier order, both will stand and be enforceable. There is an obvious unfairness about such a result. The solution is to invite the court in pro bono cases to reserve costs until the trial or other final hearing, preferably with a note on the court file to indicate the order which would have been made but for this problem. The court conducting the final hearing can then make a single order, one way or the other, which reflects the justice of the case overall including the interlocutory successes and failures.

### **What is pro bono?**

It might seem strange to end with a question the answer to which seems obvious. 'Pro bono' means free of charge. Free of charge is defined in the section as "otherwise than for or in expectation of fee, gain or reward". Just in case you were wondering, CFAs are not pro bono.

Jeremy Morgan QC

39 Essex Street